(3)

No. 91-1526

In the Supreme Court of the United States

OCTOBER TERM, 1991

FERRIS J. ALEXANDER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the forfeiture provisions of the RICO statute violate the First Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in magazines and video cassettes.

2. Whether the forfeiture of petitioner's property resulting from his RICO convictions was disproportionate to his crimes, in violation of the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-26, is reported at 943 F.2d 825. The opinion of the district court, Pet. App. 27-124, is reported at 736 F. Supp. 968.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. Pet. App. 163. A petition for rehearing was denied on October 30, 1991. On February 19, 1992, Justice Blackmun extended the time for filing a petition for a writ of certiorari to March 16, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiring to defraud the United States by impeding the lawful functions of the Internal Revenue Service, in violation of 18 U.S.C. 371; two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1); one count of receiving and using income derived from a pattern of racketeering activity, in violation of 18 U.S.C. 1962(a); one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); 12 counts of transporting obscene material in interstate commerce for the purpose of sale or distribution, in violation of 18 U.S.C. 1465; six counts of engaging in the business of selling obscene material, in violation of 18 U.S.C. 1466; and one count of falsely representing a social security number for the purpose of impeding the IRS, in violation of 42 U.S.C. 408(g)(2) (1988).

Petitioner was sentenced to a total of six years' imprisonment, fined $100,000, and ordered to pay the costs of the prosecution, his incarceration, and his supervised release. In addition, the court ordered forfeiture of petitioner's interest in several pieces of commercial real estate, his wholesale business and retail book and video stores, and the bank accounts, furniture, fixtures, and inventory of those businesses. He was also ordered to forfeit $8,910,548.10, which constituted the proceeds of his racketeering activity. Pet. App. 145. The court of appeals affirmed.

1. Petitioner was in the "adult entertainment" business for 30 years, selling magazines, showing

movies, and selling and leasing video cassettes. He sold his products through retail stores, rental stores, and theatres in several Minnesota cities. The material was distributed to those stores from a central warehouse operated by petitioner, where the materials were wrapped in plastic, priced, and boxed. The sales of the sexually explicit materials generated millions of dollars in annual gross receipts for petitioner. Petitioner established sham corporations, and he used false names and names of employees in opening bank accounts, obtaining licenses, and complying with various state and federal reporting requirements. He also filed false tax returns in 1982 and 1983 that underreported his gross receipts by $2.7 million. Pet. App. 3-7; Gov't C.A. Br. 17.

The four magazines and three video cassettes that were the basis for the racketeering and obscenity counts on which the jury convicted petitioner contained graphic depictions of nude men and women in groups of two or more engaging in heterosexual and homosexual intercourse, fellatio, cunnilingus, sodomy, and masturbation. The minimal conversation in the videos was sexually explicit in nature. Gov't C.A. Br. 17-18.

2. On appeal, petitioner contended that the forfeiture of nonobscene expressive material under the forfeiture provision of the RICO statute violates the First Amendment. Relying on the Fourth Circuit's decision in *United States* v. *Pryba*, 900 F.2d 748, cert. denied, 111 S. Ct. 305 (1990), the court of appeals held that forfeiture of such material under RICO does not violate the First Amendment as long as "there is a nexus established between the ill-gotten gains from racketeering activity and the protected materials forfeited." Pet. App. 21. The court emphasized the distinction between a prior restraint and a criminal

penalty imposed following a conviction for racketeering. *Id.* at 21-22. While the court acknowledged that the RICO forfeiture provisions could have some chilling effect on the exercise of First Amendment rights, the court explained that deterring the sale of obscene materials is a "legitimate end" of anti-obscenity laws, and that all criminal obscenity statutes have some tendency to inhibit the dissemination of nonobscene material. *Id.* at 22 (quoting *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60 (1989)).

Petitioner also claimed that the forfeiture order violated the Eighth Amendment's ban on cruel and unusual punishments. The court of appeals rejected that claim, again in reliance on the Fourth Circuit's decision in *United States* v. *Pryba*, 900 F.2d at 753, 756-757. The court noted that in *Pryba* the Fourth Circuit held that the Eighth Amendment was not violated by the forfeiture of a business with total annual sales of $2 million, in which the forfeiture resulted from the seizure of $105.30 of obscene material. Pet. App. 24-25.

ARGUMENT

1. Petitioner contends that the forfeiture provisions of the RICO statute, 18 U.S.C. 1963(a), violate the First Amendment when the predicate acts are obscenity violations and the property forfeited consists of the assets of a business dealing in expressive material, such as magazines and video cassettes. Pet. 14-26. That claim does not warrant review by this Court.

This Court has held that obscenity violations may serve as predicate acts for a conviction under state racketeering laws. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989). In *Fort Wayne Books*, the

Court acknowledged that the prison sentence and fine authorized by the state RICO statute there at issue were more severe than those authorized for a simple obscenity offense and that, as a result, some booksellers might "practice self-censorship and remove First Amendment protected materials from their shelves." 489 U.S. at 60. But the Court went on to observe that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.' " *Ibid.* (quoting *Smith* v. *California*, 361 U.S. 147, 154-155 (1959)). Accordingly, the Court concluded that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional." *Ibid.*

That analysis applies to the RICO forfeiture provisions at issue here. No First Amendment principle bars Congress from imposing a forfeiture penalty for engaging in a pattern of racketeering activity consisting of multiple obscenity violations. See *Fort Wayne Books*, 489 U.S. at 60 ("[i]t is not for this Court . . . to limit the [government] in resorting to various weapons in the armory of the law") (quoting *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957)). A forfeiture penalty is no more "chilling" than a prison sentence or fine. Indeed, if the indictment had simply alleged obscenity offenses, petitioner would have been subject to 60 years' imprisonment and a fine of $3 million. That penalty is far more severe than the RICO forfeiture imposed here. See *United States* v. *Pryba*, 900 F.2d at 756.

Furthermore, there is no merit to petitioner's argument that the forfeiture of racketeering-related assets is impermissible where the forfeited property is the assets of a business dealing in expressive material. The purpose of the RICO forfeiture provisions is to "divorc[e] guilty persons from the enterprises they have corrupted." *United States* v. *Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). Expressive materials are subject to forfeiture "not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime." *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980). As the Ninth Circuit recently stated in *Adult Video Ass'n* v. *Barr*, No. 90-55252 (Mar. 12, 1992), slip op. 2563, "[d]efendants simply have no First Amendment right to use the profits and proceeds from trafficking in obscenity to finance their constitutionally protected speech." That the RICO predicate acts are obscenity violations rather than, for example, narcotics violations is irrelevant. In either case, the purpose of the forfeiture is "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559, 565 (Ind. 1987), rev'd on other grounds *sub nom. Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989). Indeed, if bookstores, newsstands, publishing houses, and the like were immune from forfeiture, drug lords and other criminals would waste no time in investing in those businesses and insulating their criminal proceeds from seizure. *Pryba*, 900 F.2d at 755; *Adult Video Ass'n*, slip op. 2563.

Petitioner errs in relying on *Near* v. *Minnesota*, 283 U.S. 697 (1931). There, a Minnesota law provided that the publication or sale of "malicious, scandalous and defamatory" periodicals was a nuisance and could be judicially enjoined. Near published a newspaper that was found to be "malicious, scandalous and defamatory," and the state court issued a permanent injunction against him, prohibiting him from conducting any further business under the name and title of the newspaper. This Court held that the state nuisance abatement law constituted a prior restraint and violated the First Amendment. *Id.* at 713. Unlike the RICO forfeiture provisions, however, the object of the statute in *Near* "[was] not punishment, * * * but suppression of the offending newspaper or periodical." *Id.* at 711.

Unlike the defendant in *Near*, petitioner is free to engage in the production and distribution of any First Amendment-protected material after the forfeiture. Expressive material was forfeited not for the purpose of suppressing it, but because it happened to constitute an asset of a racketeering enterprise. As the Fourth Circuit explained in *United States* v. *Pryba*, 900 F.2d at 754-755, "*Near* has no application to obscenity, and sheds no light" on the question of the constitutionality of RICO forfeiture in obscenity cases.

Nor is petitioner helped by *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991). In that case, the Court held unconstitutional New York's "Son of Sam" law, which required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account to be made available to the victims of the crime and the criminal's other creditors. The Court explained that the statute impermissibly created a financial disincentive to the exercise of First Amendment rights by "singl[ing] out income derived from expressive activity for a

burden the State places on no other income," and by targeting "only * * * works with a specified content." *Id.* at 508. The RICO forfeiture provisions, by contrast, do not create a financial disincentive to speak or write, nor do they target expressive activity at all. They merely "preclude[] * * * defendant[s] from using assets derived from [racketeering] to subsidize future speech." *Adult Video Ass'n*, slip op. 2563. Nothing in *Simon & Schuster* suggests that that purpose is unconstitutional.[1]

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[1] Petitioner cites several decisions invalidating other types of state action aimed specifically at restricting expressive activity, such as padlocking a business where obscenity offenses occurred in the past or revoking a business license because of an obscenity violation. *E.g.*, *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980); *City of Paducah* v. *Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), cert. denied, 479 U.S. 915 (1986); *Gayety Theatres, Inc.* v. *City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts, Inc., III* v. *Maciejewski*, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *State* v. *Bauer*, 768 P.2d 175 (Ariz. Ct. App. 1988), cert. denied, 493 U.S. 1042 (1990). None of those cases bars the forfeiture of racketeering-related assets under the RICO statute just because those assets happen to consist of material protected by the First Amendment. Nor is petitioner helped by *State* v. *Feld*, 745 P.2d 146 (Ariz. Ct. App. 1987), cert. denied, 485 U.S. 977 (1988), in which a state court upheld the constitutionality of the State's RICO forfeiture provisions but apparently limited their application to the obscene materials themselves and to the proceeds of obscene material or of other racketeering activity. One state court's interpretation of its own state law, which predated this Court's decision in *Fort Wayne Books*, obviously has little bearing here. Finally, *J-R Distributors, Inc.* v. *Eikenberry*, 725 F.2d 482 (9th Cir. 1984), which petitioner also cites, was reversed on standing grounds by this Court *sub nom. Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), and therefore has no precedential value.

A few days before this petition was filed, the Ninth Circuit decided *Adult Video Ass'n* v. *Barr*, *supra*, which addressed the question whether RICO's post-trial forfeiture provisions violate the First Amendment. The court held that "[b]ecause a RICO forfeiture occurs only after a criminal trial on the obscenity issue, with its full panoply of procedural protections, the forfeiture represents punishment for engaging in obscenity rather than a prior restraint." Slip op. 2561. Although the court concluded that "the authorization of a forfeiture does not by itself render the RICO statute unconstitutional," *id.* at 2564, it went on to say that "the current breadth of RICO's forfeiture provision cannot pass constitutional muster," *id.* at 2565. The court explained that the government can forfeit "assets actually used in connection with the obscenity offense—that is, used to produce, market, or move obscenity through interstate commerce." *Id.* at 2565-2566. The court also explained that the government may also forfeit "assets and interests substantially financed, directly or indirectly, by the proceeds of criminal activity." *Id.* at 2566. But, according to the *Adult Video* court, "those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited." *Ibid.*

For the reasons discussed above, we take issue with the Ninth Circuit's holding that the breadth of RICO's forfeiture provisions is incompatible with the First Amendment, and we have filed a petition for rehearing and a suggestion for rehearing en banc with the Ninth Circuit challenging that holding. Nonetheless, even if the Ninth Circuit adheres to the panel's decision in the *Adult Video* case, there is no

need for review by this Court, because it is not clear that the Ninth Circuit would upset the forfeiture order entered in this case. *Adult Video* involved only a facial attack on RICO's forfeiture provisions; the court explicitly left "for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment, in light of the particular facts presented in individual cases." Slip. op. 2566. In the forfeiture order entered in this case, the district court found that all of the forfeited property constituted proceeds of racketeering activity, substantially facilitated the racketeering activity, or "supported the RICO scheme by providing the means and methods of transporting and selling obscene materials." Pet. App. 159. Such an order of forfeiture does not appear to fall outside the permissible scope of forfeiture even under the Ninth Circuit's decision in *Adult Video*.

2. Petitioner also challenges the forfeiture portion of his sentence under the Eighth Amendment Cruel and Unusual Punishments Clause. He does not challenge his six-year term of imprisonment, nor does he attack his fine or the requirement that he pay the costs of his incarceration and supervised release. Instead, he argues that the amount of the RICO forfeiture rendered it unconstitutional. Pet. 26-29. That claim does not warrant further review.

This Court recently explained that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem* v. *Helm*, 463 U.S. 277, 288 (1983)); *id.* at 2684-2701 (opinion of Scalia, J.). What is more, "[o]utside the context of

capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Solem* v. *Helm*, 463 U.S. at 289-290 (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980)). A "reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate," *Solem*, 463 U.S. at 290 n.16; "intra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring in part and concurring in the judgment).

The court of appeals correctly held that the forfeiture of petitioner's property was not unconstitutionally disproportionate to his crimes. As this Court has explained, courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem*, 463 U.S. at 290. Congress has concluded that petitioner's offenses are serious. Under the penalties that Congress has set, petitioner's predicate obscenity offenses alone could have been punished by 60 years' imprisonment and a fine of $3 million. In this light, the RICO forfeiture falls clearly within Eighth Amendment bounds. See *United States* v. *Pryba*, 900 F.2d at 756-757.

Petitioner's reliance on *United States* v. *Busher*, 817 F.2d 1409 (9th Cir. 1987); *United States*, v. *Harris*, 903 F.2d 770 (10th Cir. 1990); and *United States* v. *Vriner*, 921 F.2d 710 (7th Cir. 1991), is unavailing. In those cases, the courts of appeals themselves conducted a proportionality analysis, or remanded the case to the district court for it to perform such an

analysis, in order to determine whether the interest ordered forfeited was so grossly disproportionate to the offense as to violate the Eighth Amendment. It is doubtful that those courts would have required a proportionality analysis in this case, however, since petitioner did not make out a prima facie case that the forfeiture was excessive. In fact, the court in *Busher* noted that a proportionality analysis need be conducted only if the defendant has made a prima facie showing that a forfeiture may be excessive. 817 F.2d at 1415. Petitioner did not even attempt to make a proffer in the district court as to the value of the forfeited assets, Gov't C.A. Br. 56, and there is no record evidence to support his claim, Pet. 26, that the value of his business was $25 million. Accordingly, here, as in *United States* v. *Pryba*, 900 F.2d at 757, even if proportionality review otherwise would have been appropriate, petitioner has "failed to proffer the information that would be required for such an undertaking." Moreover, as noted above, the district court found that all of the forfeited property constituted proceeds of racketeering activity, substantially facilitated the racketeering activity, or "supported the RICO scheme by providing the means and methods of transporting and selling obscene materials." Pet. App. 159. Ordering that property forfeited is not grossly disproportionate to petitioner's crimes under the cases he cites.[2]

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[2] It appears likely that the value of the forfeiture will be significantly less than petitioner now estimates. Of the 15 bank accounts forfeited, all but a handful had been closed at the time of the forfeiture, and those still active had either a negligible or negative balance. Eighteen of the forfeited business entities were essentially the same entity, representing the different names used by petitioner over the years for his sole proprietorship. The value of the tangible assets has yet to be determined but it appears likely that it will fall well short of petitioner's estimate. Gov't C.A. Br. 45.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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